

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES LOUIS RIKER,

Defendant-Appellant.

UNPUBLISHED

January 23, 2007

No. 263726

Macomb Circuit Court

LC No. 04-003970-FH

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree child abuse, MCL 750.136b(2). Following a jury trial, defendant was acquitted of one count of first-degree child abuse, MCL 750.136b(2), and convicted of one count of the lesser offense of second-degree child abuse, MCL 750.136b(3). Because defendant was on parole at the time of commission of the sentencing offense, the trial court sentenced defendant as a second habitual offender, MCL 769.10, to four to six years in prison, with no credit for time served in jail. Defendant appeals as of right his sentence for exceeding sentencing guidelines, the content of his pre-sentence information report, and the denial of jail credit. We affirm.

Defendant argues that his guidelines range was impermissibly increased on the basis of facts not determined by the jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 403 (2004). In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *Id.*

The statutory sentencing guidelines apply to enumerated felonies committed on or after January 1, 1999. *People v Babcock*, 469 Mich 247, 255; 666 Mich NW2d 231 (2003); MCL 769.34(2). The trial court uses the guidelines to score the applicable offense and prior record variables to establish the proper range for the minimum sentence. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). These scores are then used with the sentencing grids to determine the minimum sentence range. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The trial court is required to assign the highest number of points that can be assessed under the statute. *Id.*, p 260.

Defendant disputes receiving ten points under OV 1, for aggravated use of a weapon, MCL 777.31(1)(c); ten points under OV 3, for bodily injury to a victim requiring medical treatment, MCL 777.33(1)(d); ten points under OV 4, for serious psychological injury requiring professional treatment, MCL 777.34(1)(a); and 50 points under OV 7, for aggravated physical abuse, MCL 777.37(1)(a). Defendant argues that, under *Blakely*, defendant is entitled to be sentenced on the facts actually found by the jury. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding, and therefore, not to the Michigan sentencing guidelines. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Ten points should be assessed for OV 1 if the evidence supports the finding that defendant touched the victim with a weapon other than a firearm, knife, or other cutting or stabbing weapon. MCL 777.31(1)(c). The trial court assessed ten points to OV 1, based on a video of an incident where defendant struck Kadence Clarke with a hanger. In the video, defendant opens the door to the children's room and is clearly heard hitting the wall with a hanger. The video then shows defendant walk to the crib with the hanger in his hand, and about ten hits are heard. It is clear from the sound of the hits that defendant is striking the baby and not just the crib or mattress. The trial court did not abuse its discretion in assessing ten points for OV 1.

Ten points should be assessed for OV 3 if the evidence supports a finding that there was a bodily injury to a victim requiring medical treatment. MCL 777.33(1)(d). The police came to the apartment and took pictures of the children, and these pictures were entered into evidence. The police called an ambulance to take both the children to the hospital. With respect to Kadence Clarke, the trial court did abuse its discretion in finding that the injuries required medical treatment as argued by defense counsel at the sentencing hearing. Alternative scoring as suggested by the defense of five points for bodily injury not requiring medical treatment to a victim is supported by the record. While the record supports injury requiring treatment to Santo Clarke, the record is insufficient with respect to Kadence Clarke, the victim of the charge for which defendant was convicted.

Ten points should be assessed for OV 4 if the evidence supports the finding that there was serious psychological injury requiring professional treatment. MCL 777.34(1)(a). This includes psychological injury that may require professional treatment. MCL 777.34(2). There is no requirement that the victim actually receive professional treatment, and it is sufficient that the victim was fearful during the encounter. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006); MCL 777.34(2). On the video, both children are crying and screaming during each attack, demonstrating fear. In addition, Pamela Ludolph, Ph.D., a clinical psychologist testified to the victim's sleep disturbance, separation anxiety, and her withdrawn and excessive clingy behavior.

Kadence had no problem sleeping before the incident. Kadence no longer has a crib because she screams if someone tries to put her down in one. Kadence has not slept through the night since the incident and cannot sleep unless she is touching another person. Kadence will not allow anyone to hold her except her parents and does not want to be put down at all. Kadence has so much hysteria when separated from her parents that they changed work schedules so one of them is always home with her. Before the incident, both children were calm, slept nicely, and did not have any trouble with peers. Dr. Ludolph explained that it is very difficult to get

treatment for the children at such a young age, but they could try special programs for disturbed children through the intermediate school district. There was sufficient evidence to conclude that defendant put Kadence in fear during the incident and she suffered psychological injury that may require professional treatment.

Also, 50 points should be assessed for OV 7 if there was evidence that “a victim was treated with terrorism, sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a); see also *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Sadism is “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005); MCL 777.37(3).

The trial court found cruelty, sadism, and torture where the children were not allowed to sleep and were repeatedly awoken, beaten, and screamed at for at least two hours. The video only captures two hours of the time defendant spent alone with the children. In that time, defendant beat both children numerous times, threw Santo to his bed, slammed Kadence in her crib several times, and waited for the crying to stop before slamming open the door again, screaming and banging things in the room, and then beating the children again, apparently for his own gratification. Defendant even admitted to taking out his stress on these two defenseless children. This excessive brutality over a period of several hours is sufficient to assess 50 points for OV 7 in sentencing for the crime defendant perpetrated on Kadence Clarke. See *People v Wilson*, 265 Mich App 386, 398; 695 NW2d 351 (2005). The trial court did abuse its discretion in calculating defendant’s OV score at 101 points instead of 96 points, however, the resultant scoring does not affect the sentencing grid.

Next, defendant argues that the trial court abused its discretion in departing upward in imposing defendant’s sentence. In reviewing a departure from the guidelines range, “whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion.” *Babcock, supra*, p 265. The trial court must impose a sentence within the guidelines range, unless there is a substantial and compelling reason for departure, and it must state on the record that reason. *Id.*, pp 255-256; *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). The factors considered must be objective and verifiable, must keenly attract the court’s attention, and must be of considerable worth. *Babcock, supra*, p 258. Even in the case of a departure, a trial court may not impose a minimum that exceeds two thirds of the statutory maximum. MCL 769.34(2)(b). A trial court may not depart from the guidelines range based on an offense or offender characteristic that was already considered in determining the guidelines range unless it concludes that the characteristic was given inadequate or disproportionate weight. *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005). The sentence must be proportionate to the seriousness of the defendant’s conduct and criminal history. *Babcock, supra*, p 264.

The trial court departed upward from the guidelines and stated its reasons on the record. Defendant was already on parole from a first-degree child abuse conviction. As a condition of his parole, defendant was required not to live in a residence where any child 16 or younger stays or is cared for and was not to provide care for any child under 16. Defendant was also not to be outside of his approved residence from 11:00 p.m. to 6:00 a.m. without permission. In direct violation of his parole, defendant lived in a residence where these two minor children resided,

was providing care for these children at the time of the incident, and was at the home during the prohibited hours. The parole violation in this case went to the very heart of the behavior proscribed by the Department of Corrections. The court found that the nature of the assault was not adequately addressed within the guidelines and was in deliberate violation of the parole. Defendant's behaviors were both objective and verifiable and formed the basis for substantial and compelling reasons for an upward departure. *Babcock, supra*, p 265. The upward departure was justified.

Defendant correctly contends that his criminal history was already a factor that was considered in calculating his PRV's, including the fact that he was on parole. MCL 777.51(1)(c); MCL 777.55(1)(d); MCL 777.56(1)(c). However, the PRV's did not take into account the direct violation of the parole and the relationship of that violation to the present offense. The trial court used objective and verifiable factors, separate from those utilized in scoring the PRV's. Defendant's rehabilitative potential is a justifiable consideration in determining whether there are substantial and compelling reasons to depart from the guidelines. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). Defendant's time served for his first-degree child abuse conviction clearly did not rehabilitate him, and the trial court did not abuse its discretion in concluding that the failure of rehabilitation was a substantial and compelling reason to depart from the guidelines.

Third, defendant contends that the trial court erred by refusing to change the presentence report where the prosecution included its version of what transpired on the videotape. The trial court's response to a challenge to the accuracy of the presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). Either party may challenge the accuracy or relevancy of information contained in the presentence report at sentencing. *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). The sentencing court must respond to such challenges, but it has wide discretion in doing so. *Spanke, supra*, p 648. "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id.* However, if the information is found to be inaccurate or irrelevant, it must be corrected or stricken from the report. *Hoyt, supra*, p 534. Unless a defendant effectively challenges the information in the presentence report, it is presumed to be accurate. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

At sentencing, defense counsel objected to the description of the incident in the presentence report because it was the prosecution's interpretation of the videotape, and the court previously ruled that the description of the incident would not be introduced to the jury. The trial court responded to the objection, stating that for purposes of introduction to the jury, it was for the jury to decide what was on the tape. The trial court also concluded that, for the purpose of conveying the incident to the Department of Corrections, it was a fair description of what occurred. The purpose of the presentence report is to give the court the information necessary to tailor the sentence to both the offense and the offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997). The trial judge viewed the videotape and reasonably determined that the description of the incident in the presentence report was an accurate reflection of what transpired. Therefore, there was no abuse of discretion.

Finally, defendant argues that he was entitled to credit for the days spent in jail between the time of his arrest and sentencing. Because this issue has not been properly preserved by

objection at sentencing, it is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense.” *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004); MCL 791.238(2). The defendant receives credit for the time served in jail for the sentence for which the parole was granted. *Id.*, p 705; *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994). In addition, the defendant must serve the remainder of his sentence for the previous offense before beginning the sentence for the subsequent offense. *Seiders, supra*, p 705; MCL 768.7a(2). While this is not necessarily the remainder of the maximum, the defendant must serve at least the combined minimums of his sentences, plus whatever portion of the earlier sentence that the parole board requires him to serve. *Wayne Co Prosecutor v Dept of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996).

Defendant was on parole at the time of the offense. Defendant was sentenced to 3 to 15 years in prison on September 14, 1998, for first-degree child abuse. Defendant was granted parole on December 16, 2003, and this incident occurred on October 8, 2004. The eight months and one week defendant served in jail from his arrest to his sentencing should have been credited to his prior conviction and applied to the remainder of that term. *Seiders, supra*, p 705. Defendant had already served his minimum sentence for the prior conviction, so he must serve the four year minimum of the present sentence plus whatever portion of his remaining previous sentence that the parole board decides. Defendant contends that the Michigan Department of Corrections merely stacked the balance of his time from the first conviction to the maximum sentence imposed in the present case and attached the Basic Information Sheet as verification. However, a review of the referenced Basic Information Sheet shows this is impossible. The dates indicated on the sheet show a range of 4 years to about 11 years, 5 months. Defendant had over nine years left on his maximum sentence at the time of his parole, so that remainder could not have been added to the six year maximum in his present sentence. It appears that defendant not only received credit for the jail time, but the parole board did not require him to serve the entire remainder of his maximum sentence from the previous conviction. This Court has held that it trusts the Department of Corrections to count the time served against defendant’s original sentence and does not have jurisdiction to order such action. *People v Watts*, 186 Mich App 686, 687 n 1; 464 NW2d 715 (1991). The trial court did not err in denying defendant jail credit for his present sentence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra